

DORA HENNING

VS.

Respondent

AND

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

Claimant seeks a remand of this case to the Administrative Law Judge with directions that additional time be granted for claimant to present evidence. In his brief to the Appeals Board claimant's counsel describes the issues under the three following

categories: (1) Motion to Transfer, (2) Motion to Compel and for Sanctions, and (3) Extension of Terminal Dates.

The Appeals Board would restate the issues as follows: (1) Did the Administrative Law Judge have jurisdiction to decide the claim once claimant had requested the Director to transfer this case pursuant to K.S.A. 44-523(c)? (2) Should the Administrative Law Judge have recused himself or been removed from the case by the Director pursuant to claimant's counsel's allegations of bias and prejudice on the part of the Administrative Law Judge against the attorney representing claimant? and (3) Did respondent engage in fraudulent or abusive acts or practices? and (4) Should claimant's most recent request for extension of her terminal date have been granted?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts are known to the parties. They are summarized in the Administrative Law Judge's Award. We need not repeat them herein. Based upon the evidence presented and our review of the record as a whole, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Issue No. 1: A Motion directed to the Director dated December 18, 1995 was filed as received by the Division of Workers Compensation on March 6, 1996. An identical Motion with a certificate of mailing dated February 12, 1996 was filed stamped as received February 13, 1996 by the Division. In these two motions, claimant's counsel requested, inter alia, that the Director transfer this case to another administrative law judge for decision pursuant to K.S.A. 44-523(c). By the date claimant served this Motion, respondent had filed its submission letter. Claimant had not filed a submission letter but all terminal dates had passed and claimant's Motion to Extend Terminal Dates had been denied. The Administrative Law Judge issued his decision on February 13, 1996. Claimant contends the Administrative Law Judge was without jurisdiction to decide the case because the mandatory language of K.S.A. 44-523(c) requires that the director transfer the case upon request whenever an Award is not issued within 30 days after a case is submitted. K.S.A. 44-523(c) provides:

"When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record."

Claimant's counsel has made this argument to the Appeals Board on prior occasions. We have consistently held that the filing of a letter or motion requesting transfer does not divest the administrative law judge of jurisdiction until such time as an order removing the case from the administrative law judge and assigning it elsewhere. In the case of Ronald L. Reinhart v. Superior Industries Int'l, Docket No. 180,932 (June 1995) we said:

"The filing of a notification of a tardy decision or of a request for transfer does not act as an automatic or instantaneous transfer of the case from the administrative law judge to which it was originally assigned. Because the Director had not removed the proceeding from the Administrative Law Judge nor reassigned it before the Award was issued, the Administrative Law Judge retained jurisdiction over the proceeding and the authority to enter the Award."

The Appeals Board decision in Reinhart was affirmed by the Court of Appeals in an unpublished decision wherein they quoted the above language with approval.

We reject the argument that the filing of a request under K.S.A. 44-523(c) would operate automatically to deprive the tardy administrative law judge of jurisdiction. See Davis v. Haren & Laughlin Construction Co., 184 Kan. 820, 339 P.2d 41 (1959).

Issue No. 2: We turn now to the second basis for claimant's motions to transfer. In those motions claimant alleged "that Judge Clark has shown a pattern of vindictiveness towards Claimant's counsel and the Claimant does not believe that Judge Clark has acted fairly and impartially in this case." Claimant went on to request that the case be transferred to another administrative law judge because of the alleged failing by Judge Clark to "act reasonably without partiality" as required by K.S.A. 44-523(a). Claimant's counsel took exception to Judge Clark's October 5, 1995 ruling on claimant's Motion to Extend Terminal Dates and wanted that Motion to be reconsidered by another administrative law judge. The Director took no action on claimant's Motion and an Award was entered by Judge Clark on February 13, 1996. When timely and properly raised, we believe due process requires that concerns such as those raised by claimant's counsel should be addressed.

Neither the Kansas Workers Compensation Act nor the Director's Rules provide for a procedure to address a party's allegations of bias or prejudice on part of an administrative law judge. However, the Kansas Administrative Procedure Act, K.S.A. 77-501, et seq., provides some guidance. It provides that such concerns should first be presented to the administrative law judge. K.S.A. 77-514. Given that the director has the authority to assign a case to an administrative law judge and may remove an administrative law judge from a case, the director has, in the past, been considered the appropriate authority to hear appeals on such matters. In 1993 the Legislature gave the Appeals Board the authority to review those decisions. K.S.A. 44-551. In this case, claimant did not ask the Administrative Law Judge to recuse himself. Therefore no decision was made by the Administrative Law Judge on claimant's request. As we have stated, the Director did not rule on claimant's Motion.

K.S.A. 44-551(b)(1) confers authority upon the Appeals Board to review all acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge. We interpret this authority to include rulings made by the director and assistant directors acting in the capacity of an administrative law judge. Whether our jurisdiction extends to orders entered by the director acting in his administrative capacity or exercising his authority separate and distinct from that of an administrative law judge is not clear. What is clear is that claimant is entitled to some review. However, the Appeals Board cannot review a matter which has never been decided. It could be argued that the Administrative Law Judge's Award is a de facto decision on the claimant's Motion. However, we consider the issue to require a separate and specific determination. In this case the Motion was never presented to the Administrative Law Judge and apparently was not presented to the Director until after or on the same day the case was decided. A remand for determination of this issue is not necessary. Due process is satisfied by the Appeals Board's de novo review of the case. The underlying issue which prompted claimant's motion for a transfer was the denial of his request for an extension of terminal dates. Whether terminal dates should be extended is an issue before the Appeals Board. Accordingly, we find claimant's motion to transfer has been rendered moot by virtue of this appeal.

Issue No. 3: Counsel for claimant alleges in his brief that respondent asserted "affirmative defenses which it knew were without merit and concealed documents and material facts for the purpose of denying the Claimant compensation to which she was entitled" Claimant's counsel further alleges such conduct is prohibited under K.S.A. 44-5,120 as "fraudulent or abusive acts or practices." Claimant contends her July 26, 1995 Motion to Compel and for Sanctions should have been granted. At the October 5, 1995 hearing before the Administrative Law Judge, the claimant's Motion to Compel and for Sanctions was denied. The Motion to Compel was rendered moot by the denial of the claimant's Motion to Extend Terminal Dates. The Motion for Sanctions was improper. The

provisions of the Workers Compensation Act creating a remedy for fraudulent and abusive acts or practices contemplate a separate cause of action and provide for separate procedures for the enforcement of same. See *Elliott v. Dillon Companies*, 21 Kan. App. 2d 908, 908 P.2d 1345 (1996). The Appeals Board has held that neither the administrative law judge nor the Appeals Board has jurisdiction to grant relief under K.S.A. 44-5,120, *et seq.* See *Doug A. Edwards v. SDS, Inc.*, Docket No. 184,306, (July 29, 1994); Docket No. 185,977 *Margaret Kathy Murphy v. UPS*, (August 18, 1995).

Issue No. 4: We now turn our attention to what is probably the crux of this appeal; that is, the issue of terminal dates. K.S.A. 44-523(b)(4) provides that an extension of time limits may be granted "on application for good cause shown." After a thorough review of the evidence and consideration of the motions, briefs and arguments of the claimant, we do not find a showing of good cause for extending claimant's terminal date. Claimant was given ample opportunity to be heard and to present her evidence. The Administrative Law Judge appears to have bent over backward to accommodate claimant in this regard. The chronology of events outlined in the Award of the Administrative Law Judge as well as that set forth in the brief of claimant lead unescapably to this conclusion. The last date of injury was May 12, 1989. Claimant's Application for Hearing was filed August 6, 1990. Regular Hearing was commenced on March 26, 1993 and claimant's terminal date established for 60 days thereafter. Respondent submitted its case July 22, 1993. Claimant's August 24, 1993 request for an extension of her terminal date was ultimately granted. Nevertheless, by the time of claimant's last terminal date of April 22, 1995, no evidence had been taken. Although we are loathe to do so, we find that this claim must be decided on the evidence that was of record upon the expiration of the established terminal date. Accordingly, the Award of the Administrative Law Judge is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 13, 1996 should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Pittsburg, KS
Gregory D. Worth, Lenexa, KS
Gilbert E. Gregory, Fort Scott, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director